IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14/10/2003

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THE HONOURABLE MR.JUSTICE A.K.RAJAN

Writ Petition No.19050 of 2002
ans Writ Petition Nos. 19051 to 19052 of 2002

The Madras Aluminium Company Limited
having its Registered Office and factory
at Mettur Dam 636 402,
rep. herein by its
Company Secretary ..... Petitioner in all WPs.

-Vs-

1. The Tamil Nadu Electricity Board
800, Anna Salai
Chennai 600 002
rep. by its Chairman

2. The Superintending Engineer
Tamil Nadu Electricity Board
Mettur Electricity Distribution Circle
Mettur Dam 636 401.
rep. by Accounts Officer(Revenue) ..... Respondents in all WPs.

Petitions filed under Article 226 of the Constitution of India,
praying to issue a writ of certiorarified mandamus, as stated therein.

For Petitioner : Mr.R.Krishnamoorthy
Senior Counsel for Mr.V.Nataraj

For Respondents : Mr.R.Muthukumarasamy
Additional Advocate General
for Mr.N.Srinivas
Standing Counsel for TNEB

:ORDER

These writ petitions have been filed for the issuance of writ of certiorarified mandamus, to call for the records of the respondents demanding the petitioner to pay the amount mentioned in the electricity Bills, and to quash those bills and to direct the respondents to accord its formal sanction for reduction in the contracted demand from 23,000 KVA to 10,000 KVA with

effect from 27.02.2002.

2. The brief facts as stated in the affidavit filed in these writ petitions are as follows:-
The petitioner company is engaged in the manufacture of Aluminium at Mettur Dam from 1965; the process requires enormous quantities of electricity; nearly 40% of the cost of production of Aluminium goes for electricity; the increased power tariff coupled with unstable power supply resulted in the company becoming sick in the year 1987; a scheme for rehabilitation was sanctioned by BIFR in January,1989; since the said scheme failed, the company was ordered to be wound up; thereafter the Government of Tamil Nadu issued GOMs.No.165 dated 28.04.199 2, granting various concessions and reliefs; BIFR sanctioned a fresh scheme and additional concessions were also given by the Government of Tamil Nadu by GOMs.No.37 dated 10.02.1995; the company once again, commenced production in February, 1995.
Originally the company had a contracted load of 67,000 KVA. The company established its own power plant at enormous cost of about 275 Crores; thereafter the company on 12.01.1999 applied to the Board for reduction of its contracted demand from 67,000 KVA to 23,000 KVA; it was accepted and agreement to that effect was concluded on 03-05 .1999. Subsequently the respondents revised the charges from Rs.150/- per KVA to Rs.300/- per KVA from December, 2001. Hence, the petitioner incurr an additional expenditure of Rs.39 lakhs per month; in fact charges for 13,000 KVA actually utilised, is paid by the petitioner; Therefore, the petitioner applied on 24.12.2001 for a reduction of the contracted demand from 23,000 KVA to 10,000 KVA; it also requested that such reduction be made effective from 27.01.2002. The petitioner offered to pay as required under the terms and conditions of agreement; the additional Chief Engineer, Mettur, informed by letter dated 22.01.2002, that the matter had been referred to the competent authorities for orders; also the Member Distribution by his letter dated 30.01.2002, intimated to the petitioner that the formalities have to be complied with; the technical necessity for continuance of the existing 230 KVA Malco Substation for the reduced demand has to be decided and also it requires the execution o f the revised agreement for the reduced demand. Further, Clause 13.01 of the agreement also provides for termination of the agreement by the consumer at any time by giving one month's notice in writing.
In fact, the petitioner had reduced its consumption within 10,000 KVA from March,2002. But, the petitioners are billed for 23,000KVA. Since the petitioner did not receive any reply on the request made by them, letters were addressed on 28.02.2002 on 07.05.2002, and on 26 .03.2002 to reduce the maximum demand. The actual monthly consumption for the months of March and April,2002 was only 8240 KVA and 7040 KVA respectively, hence, the petitioner paid a sum of Rs.32,000/- for each of these months. The respondents had deliberately, without any basis, declined to respond to the petitioner's request for sanctioning the reduction of the contracted load. The petitioner is not liable to pay the bill amount, since they wanted for reduction of contracted load from December,2001.

Earlier the respondents unreasonably withdrew the concessional power tariff and hence the petitioner filed W.P.No.19331/99 and the High Court allowed the writ petition and against that an appeal is pending in WA.No.2506

of 1999. The petitioner also filed other writ petitions seeking exemption from the levy of electricity tax for generation and consumption of electricity through its own captive power plants. All the writ petitions have arisen solely due to unreasonable acts of the respondents. The change in the contracted demand will have to be permitted as far as possible on the date of the billing and accord of sanction is only of procedural formality. There is no discretion vested with the respondents to decline to reduce the contracted demand.

The act of refusing to consider the application is tinged with ulterior motives. Further the act of refusal is against the public interest, since the excess power could be utilised for public consumption.

Therefore, the writ petition 19050/2002 is to issue writ of certiorarified mandamus to call for the records of the respondents relating to bill No.20 dated 29.05.2002, demanding the petitioner to pay, inter alia, a sum of Rs.69,00,000/- towards electricity charges month of May 2002 and a sum of Rs.1,59,705/- surcharge for the alleged belated payment and to quash the charges in excess of 10,000 KVA and also the surcharge of Rs.1,59,705/- and direct the respondents to reduce the contracted demand from 23,000 KVA to 10,000 KVA with effect from 27.02.2002.

The prayer in the other writ petitions 19051 and 19052 of 2002 are to quash the demand of Rs.39 lakhs each for the months of March and April,2002.

3. In the counter filed by the respondents, it is stated as follows:

Two separate 110 KV feeders were constructed in the year 1979 to cater the requirement of the petitioner. The power restriction and control was not imposed to the petitioner. A vital grid 230 KV/110 KV sub station with huge cost was established and it is being maintained for feeding the uninterrupted power supply to the petitioner's company. The petitioner cannot reduce the contracted demand unilaterally; it cannot be effected as per the whims and fancies of the petitioner; the board has invested several crores of rupees in establishing generating stations, transmission networks and maintaining substations to feed power supply continuously to the petitioner company. It should be ensured that at least a portion of the public money should be realised before reduction of the demand. The bills are raised in accordance with the agreement.

Clause 13.04 of terms and conditions of supply cannot be applied for the reduction of demand. The payment of one time charges contemplated under Clause 22.07 would arise only on sanction by the competent authority. After the expiry of concession of the tariff, the respondents charged at normal tariff as applicable to other industrial consumer.

Reduction in the contracted demand is not a mere procedural formality; involves taking a policy decision. Until the contracted demand is reduced, the petitioner is bound to pay for the agreed demand as per the agreement and also liable to pay interest for the belated payment. The change in demand can be done only with the sanction of the competent authority; it cannot be given on the receipt of the application.

The GOMS.No.165 dated 28.04.1992 expired in the year 1996. Then the Government ordered to charge the petitioner with the normal tariff. The withdrawal of the concessional tariff was not unreasonable. The order of the High Court in W.P.No.19331 of 1999 is now pending in appeal. Electricity tax is levied as per the provisions of the Act. Various factors are to be

considered before the sanctioning the reduction of contracted demand. The action of the petitioner company in making lesser payments necessitated the respondent to issue the statutory notice under Section 24(1) of the Indian Electricity Act, 1910 calling for the balance payment and also for imposing surcharge due to belated payment. The financial hardship to the petitioner cannot be a reason for not paying the bill. Time can not be fixed for reduction sought for by the petitioner; no ulterior motive can be alleged for not considering the request immediately. The petitioner request is yet to be considered and given effect to. The charges levied are legal and valid as per the agreement.

4. A reply affidavit has also been filed refuting the contentions of the respondents made in the counter.

5. The learned Senior Counsel Mr.R.Krishnamoorthy appearing for the petitioner submitted that originally the petitioner had a contracted load of 69000 KVA and at the request of the petitioner, it was reduced in the year 1999 to 23000 KVA. Thereafter, a further request to reduce it from 23000 KVA to 10000 KVA was made as early as on 22.04.2001 . Though the respondent reduced the contracted demand, for some other consumers by order dated 04.01.2002 and 28.01.2002 the respondents have granted reduction for the petitioner. The inaction of the respondents to grant reduction amounts to arbitrariness and hence violates equality clause. In fact by letter dated 22.01.2002, the petitioner was informed that their request is under consideration and it has been referred to the competent authority for orders. But, no orders have been passed till date. Remainder were addressed on 07.02.2002 and on 22.02.2002. In spite of that bills were sent for the 23000 KVA for the months of March as well as April, 2002. Therefore, they had no option but to pay the bill under protest. Thereafter, the petitioner also sent a notice through its lawyer on 18.05.2002. Further, the learned counsel submitted that when the sanctioned load is reduced from 23000 KVA to 10000KVA, the surplus can be gainfully utilized for other purposes which would definitely be in the public interest. Therefore, even viewed on the part of the public interest, the petitioner' s request should have been complied with immediately. The noncompliance of the request is only due to the fact that the petitioners have filed Writ petitions against the orders passed by the respondents. Filing of the writ petition cannot be taken as a ground to refuse the request. By filing writ petition they are only trying to establish their legal rights; that cannot be found fault and that cannot be resulted in any penal consequences. Further the learned counsel submitted that the respondents cannot compel the petitioner to cancel the agreement in toto. It is for the petitioner to decide whether to cancel the entire agreement or to get a reduced load. Therefore, the respondents cannot direct or compel the petitioner to cancel the agreement. At the same time, the respondents have no justification for not acceding to the request for reduction in the load. Because of the inaction on the part of the respondents, the petitioners are compelled to pay a sum of Rs.39 lakhs per month for the electricity which they did not consume. Therefore it amounts to misappropriation. In this circumstance, the petitioner has no alternative except to pay it under protest and to approach this Honourable Court for the relief stated in the petition. Therefore, the petitioners are entitled to the relief as prayed for in all the three writ petitions.

6. The learned Additional Advocate General, Mr.K.Muthukumarasamy,

appearing for the respondents submitted that the petitioner company started in the year 1964. They were charged concessional tariff till 19 84. The sanctioned load was 69000 KVA till 1995. Thereafter, the petitioner established three electricity generating units which produced totally 75000 KVA. Therefore, the respondents reduced the demand from 67000 KVA to 29000 KVA. An agreement has been entered into between the parties on 3rd May, 1999. There is a specific Clause in agreement that the Board shall supply and the petitioner shall take from the Board Electric Energy not less than 23000 KVA per month. That was the contracted load for the petitioner's exclusive use. This agreement is to be in force for a period of five years as per paragraph-11 or until it is terminated by either party; The period comes to an end on 03.05.2004. Therefore, during the period of the agreement, the petitioner has no right to reduce the load. As per Clause 19.02 of the terms and conditions of Tamil Nadu Electricity Board, " the maximum demand charges for any month shall be based on the KVA demand recorded in that month, or 100% of the sanctioned demand which ever is higher....."
Therefore, the billing was done in accordance with the terms and conditions of the agreement. The petitioners cannot unilaterally reduce the sanctioned demand.
7. The counsel further submitted that reduction in the demand, could be done only by mutual agreement. Unless and until the sanction is made by the Board for reduction in the demand, the petitioner cannot assume that the sanctioned demand has been reduced from the date on which he had applied for. The petitioners case is a unique case and it cannot be compared with any other consumer. The example cited by the petitioner that two other companies were reduced the sanctioned load on 04.01.2002 and 28.01.2002 has no comparison at all with the petitioner. In one case, the sanctioned demand was reduced from 250 KVA to 205 KVA and in other case, it was reduced from 300 KVA to 205 KVA. These two are small consumers whereas the petitioner is unique consumer and it is a Clause by itself. That reduction to those consumers cannot be equated with the case of the petitioner. Further with respect to small consumers, the reduction can be made by the Executive Engineer whereas the petitioner's request has to be approved by the Board; only the Board can take a decision on that. In these circumstances, the Board has to be given a reasonable time to consider various aspects before granting the approval for the reduction to the petitioner.

8. The learned Additional Advocate General further submitted that in order to supply electricity to the petitioner, a separate substation had to be built up by the respondent only for the purpose of catering the petitioner. Enormous expenditure was incurred for putting up that substation; that cannot be ignored while considering the present request of the petitioner. It is also necessary for the Board to consider whether the surplus could be utilised gainfully and using the substation that was built to cater the petitioner. All these things results in taking some time before taking the decision on these aspect by the Board. The petitioner cannot compel the Board to take a decision immediately. Till such reduction is made by the Board, the petitioner is bound to pay the charges as per the agreement. Therefore, the present prayer in all these writ petitions cannot be granted and they are liable to be dismissed.
9. From the affidavit and counter affidavit filed in this case and

the arguments advanced by both the parties the following facts are admitted by both sides. (i) The petitioner had a contracted load of 67,000KVA per month. Subsequently, at the request of the petitioner it was reduced to 23000 KVA. (ii) Since the petitioner is a consumer of large quantity of electricity, the Electricity Board had erected a separate substation spending huge sums of money to facilitate electricity supply to the petitioner. (iii) When the sanctioned load was reduced to 23,000KVA, an agreement has been entered into between the parties on 03.05.1999
(iv) "The agreement shall remain in force for a period of five years from the date of its commencement; as defined in Clause(2)
(v) The agreement shall remain in force until it is terminated by either party as provided in the conditions of supply."
(vi) The agreement contains a clause that the petitioner shall not effect any change in maximum demand or contracted load."

10. The case of the petitioner is that though there is an agreement between the parties, the contracted load can be reduced by the petitioner when it does not require the entire contracted load. Therefore, when a request was made to that effect to reduce the contracted load from 23000 KVA to 10000 KVA per month, the Electricity Board shall reduce the contracted load; it cannot refuse to reduce it; the respondent has no option but to accede to the request made by the petitioner. Even if the petitioner's request was not granted, the petitioner cannot be asked to pay for the contracted load; after the request was made to reduce the contracted demand, the petitioner is entitled to pay only for the actual energy consumed.

11. The Electricity supplied to the petitioner is governed by the terms of the agreement dated 03.05.1999. Clause (1) of the terms of the agreement reads as follows:
"(1). The consumer shall not effect any change in the maximum demand or contracted demand." That means the petitioner cannot effect any change in the contracted demand during the period of the agreement. The present request is contrary to this specific terms of the agreement. The terms of the agreement can be altered if agreed to by both the parties to the agreement. But, until it is so altered, the terms of the agreement is binding on the parties. Merely because it was requested by the petitioner to reduce the contracted demand it does not alter the terms of the agreement unless and until the Electricity Board consented for such modification in the terms of the agreement. Inasmuch as the period of agreement is not yet over the agreement is binding between the parties. Therefore, the petitioner has no right to unilaterally cancel or reduce the contract ed load.

12. Further under Clause-8, it is specifically provided that even if no electricity is consumed for any reason what so ever and also the charges for the electricity actually consumed is less than the minimum charges, a consumer shall pay the minimum charges every month as prescribed in the tariff. There is no provision permitting modification of the terms of the contract in the agreement. Therefore, unless it is mutually agreed between the parties, the terms of the agreement cannot be altered.

13. It is for the respondent to accept or reject the request for reduction in the contracted load. That is the petitioner request does not have the effect of reducing the contracted load to 10000 KVA. The respondent/Electricity Board is at liberty to reject any request for modification of the agreement. When that be the case, the petitioner wants to implement his request to reduce from 23,000KVA to 10,000 KVA unilaterally on the ground that once it has been requested for reduction in the contracted load, it shall automatically be accepted and the contracted load should be reduced. Only on that ground, the petitioners have refrained from paying the bills sent for the months of March and April,2002 and subsequently they paid the bill under protest. Inasmuch as the request for reduction of maximum load from 23,000 KVA to 10,000KVA is not permissible as a matter of right, the prayer in the writ petition cannot be granted by this Court. It is for the authorities, if they so chose to accept this request. Merely because communications were sent to the petitioner stat ing that his request is being considered by the Board, the petitioner cannot immediately come to the conclusion that their request has been accepted, especially when there is a specific Clause that the contract shall remain in force for five years until it is terminated by either party. Therefore, the only other option for the petitioner is to terminate the contract as provided under the terms and conditions of supply. The petitioner has not chosen to terminate the contract, but wants reduction of sanctioned load. Since it is the discretion of the respondent to accede to the request of the petitioner, unless such reduction is permitted by the respondents, the sanctioned load cannot be deemed to have been reduced.

14. The learned Senior Counsel appearing for the petitioner referred to the reduction given in case of two consumers and contended that not acceding to the demand of the petitioner is arbitrary. As pointed out by the learned counsel for the respondents that was a reduction of less than 100 KVA whereas in the particular case, the reduction is 12000 KVA. This cannot be done without taking into account the other circumstances as to whether the respondent have sufficient infrastructure to utilise this surplus of 13,000KVA gainfully and also the respondent has got a right to recover some profit for the investment made for establishing a separate 230 KVA substation for supplying electricity to the petitioner. All these are matters which can be decided only by the Electricity Board. Only when all these aspects are concerned by the Board, a decision can be arrived. In such circumstances, the petitioner cannot insist that an order should be passed immediately or the order has deemed to have been passed already and on that assumption, permit the petitioner to pay charges only for 10,000 KVA.

15. Therefore the prayer in WP.No.19050 of 2002 cannot be granted, since there is no legal right for such a claim. This Court cannot grant a writ of mandamus directing the respondent to reduce the sanctioned load from 23,000KVA to 10,000KVA. Therefore, WP.No.19050 of 2002 is dismissed, with costs.

16. W.P.Nos.19051 and 19052 of 2002 are to quash the consumption bill for the months of March and April,2002. Inasmuch as it has already been held that the petitioner is bound to pay charges for the contracted load and whether or not they consumed 23,000KVA, they are bound to pay the charges for the minimum 23,000KVA during the currency of the contract. In the circumstances, the prayer in these two writ petitions to quash the demand

notice can not be granted. Therefore, W. P.Nos.19051 and 19052 of 2002 are also dismissed, with costs.

17. In the result, W.P.Nos.19050 to 19052 are dismissed with costs.

14.10.2003
Index:Yes/no
Internet:yes/no
ksr

To
1. The Tamil Nadu Electricity Board
800, Anna Salai
Chennai 600 002
rep. by its Chairman

2. The Superintending Engineer
Tamil Nadu Electricity Board
Mettur Electricity Distribution Circle
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